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IN THE

Supreme Court of the United States

October Term, ~~1958~~ 59

No. [redacted] 32

CHRISTIAN F. BRAEN,

Petitioner,

against

PFEIFER OIL TRANSPORTATION COMPANY, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

October Term, 1958

No. 706

CHRISTIAN F. BRAEN,

Petitioner,

against

PFEIFER OIL TRANSPORTATION COMPANY, INC.,

Respondent.

BRIEF FOR PETITIONER

Opinions of the Court Below

There was no opinion by the District Court (Eastern District of New York). The opinion of the United States Court of Appeals, for the Second Circuit, by Swan, C.J., concurred in by Moore, C.J., Kaufman, D.J. dissenting, is reported in 263 F. 2d 147. It is printed at pages 70-76 of the record.

Jurisdiction

The jurisdiction of this Court is based on 28 U. S. C. A., Section 1254 (1), which provides that cases in the Court of Appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to a civil case after rendition of judgment.

After a jury trial, there was a District Court judgment in favor of the petitioner in an action brought pursuant to the Jones Act, 46 U. S. C. A. §688. The judgment was reversed and the complaint dismissed by the United States Court of Appeals for the Second Circuit on January 23, 1959 (R. 76).

Judgment pursuant to the reversal was entered on January 23, 1959. Within ninety days, on February 18, 1959, a petition for certiorari was filed. Certiorari was allowed by order dated March 30, 1959, the case being transferred to the summary calendar (R. 76-77).

Statutes Involved

1. The Jones Act, 46 U. S. C. A. §688, which provides:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *"

2. The Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. Sec. 901, *et seq.*, which provides:

Sec. 902. Definitions.

When used in this Chapter—

(2) The term "injury" means accidental injury or death arising out of and in the course of employment * * *.

(3) The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Sec. 903. Coverage.

(a) * * * No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, * * *

Sec. 905. Exclusiveness of Liability.

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, * * *.

3. 28 U. S. C. A., Section 2111, which provides:

"On the hearing of any appeal or writ of certiorari in any case, the Court shall give judgment after an examination of the record, without regard to errors or defects which do not affect the substantial rights of the parties."

Questions Presented

1. Where in a Jones Act case a jury has found that the injured, a conceded seaman and member of a crew when ordered by his employer to do work, was hurt in the course of such employment when doing that work so as to be entitled to his remedies under the statute, and the District Judge has denied motions to set the verdict aside and for judgment n.o.v., was there that complete absence of probative facts to support the conclusion reached by the jury which empowered the Court of Appeals to overturn the jury findings on the issues and itself direct final judgment against him?

2. If the Court of Appeals erred in holding that there was no question of fact as to the status of the petitioner at the time he was injured, should the case be remanded for a new trial because of alleged deficiencies in the District Court's instructions to the jury on that issue, or is the petitioner entitled to a reinstatement of his District Court judgment on the ground that the errors, if any, were harmless and did not affect substantial rights (28 U. S. C. A., Section 2111)?

Statement of the Case

The defendant, Pfeifer Oil Transportation Company, was in the business of transporting petroleum products; in the conduct of that business it used barges and tow boats (R. 45). Braen, the petitioner, was a seaman who had Coast Guard ratings as a Chief Cook, and Chief Steward (R. 19). He also had a Barge, Tankerman's certificate (R. 19).

Braen had been employed by defendant as a mate aboard its barge, the Pfeifer No. 2, for about four months

prior to January 22, 1953 (R. 18-20, 39). There were three men to the crew (R. 19). The union contract called for an eight-hour day (R. 19). The arrangement on the Pfeifer was that two men would work twelve hours a day so that one man would always be off (R. 19).

As of January 22, 1953 Braen had been working aboard the Pfeifer twelve hours a day for two weeks (R. 61). He testified to his duties:

> "My duties were many. We handled all the lines at all times, both in making to a dock, leaving a dock, attaching the tug to the vessel: it was non-propelled, non-self-propelled, leaving the tug go, and we loaded and unloaded the cargo.
>
> We handled the hose for the loading and the unloading of the cargo, which we refer to as the cargo hose, and we prepared our own food. We put up our navigation lights when necessary, done the maintenance of the barge, painting, chipping, scraping, things like that; and minor repairs, repairs that we could handle between the two men aboard the barge." (R. 19)

The Captain of the Pfeifer No. 2 testified to the same effect (R. 39).

Braen was protected in his status by the union contract (R. 19, 68). This contract provided that a member of the crew of a vessel operating more than 48 consecutive hours could not be laid off except on three days' notice after the vessel was moored in her berth (R. 68, 69). The contract also protected the employer, providing that if a member of the crew quit his job without giving three days' notice of his intention to leave, he forfeited three days' pay to the employer (R. 69).

A day or two before the accident, one of the Pfeifer's pumps became out of order (R. 20). Accordingly, the vessel was ordered to defendant's repair yard at West New Brighton, Staten Island, where it arrived on January 21, 1953 (R. 20, 21).

Among the facilities maintained by defendant for the repair of its vessels at the West New Brighton Yard was a floating barge, the Winisook (R. 26, 33, 34, 45, 50; Ex. 2 at R. 50, Ex. B at p. 58), secured to the dock by lines and cables (R. 39, 42, 50).

The space between the Winisook and the dock was occupied by a floating raft (R. 23, 24), depicted in the exhibits at pages 60 and 62 of the record. It was held in place by a line attached to the Winisook (R. 61).

The purpose of the raft, owned by defendant (R. 46), was to facilitate chipping, painting and welding work on such of its vessels as required those procedures (R. 27, 65). When the raft would be so used in connection with the barge, Braen would help out (R. 27).

New decking was being installed on the raft and on January 22, 1953, about three-quarters of the decking had been completed (R. 23, 35, 48).

When the Pfeifer No. 2 arrived at West New Brighton it was moored to adjoin the open water side of the Winisook (Ex. 1 at p. 55).

In order for the crew of the Pfeifer No. 2 to leave or board it, they had to go by way of the Winisook, utilizing a planked ledge or catwalk that ran around its sides (R. 59-60, 62, 66, 67). In other words, the catwalk of the Winisook was a necessary means of passage getting off the Pfeifer No. 2, whatever the purpose.

The catwalk had been in bad shape for a long time, splintered and worn (R. 60). Complaints had been made to those in authority but nothing had been done about it (R. 61).

When the Pfeifer was moored on January 21, Braen and the captain began work on disassembling the defective pump (R. 21, 64-65). Work ceased at approximately 4:00 o'clock to be resumed the next morning at 8:00 o'clock

(R. 29-30). In the interval, Braen ate and slept aboard the Pfeifer (R. 21).

Next morning, Braen resumed work at about 8:00 o'clock (R. 23). The intention was to work until 4:00 o'clock unless the boat went out prior to that time (R. 29). It was anticipated that the Pfeifer would probably leave that day (R. 65).

Shortly after Braen resumed work, Edward Smith, the over-all repair boss for the defendant, appeared aboard (R. 23, 46). He told Braen that there was too much help on the one job and directed Braen to "finish putting this top deck of planks on this raft over here so that we can use it. Get this job done" (R. 23).

The nature of the conversation between Smith and Braen was in dispute. Smith testified that he told Braen that the latter had to be laid off; that he offered Braen an opportunity of one or two days' work, decking the raft; that Braen accepted the invitation (R. 46). This alleged lay-off was categorically denied by Braen (R. 70). It was this purported lay-off that bottomed the employer's contention during the trial that at the time of his injury Braen was not a member of the crew but a shipyard carpenter.

Suffice it to say, on this aspect of the case, that it was for the jury to decide what the conversation had been. It is undisputed that the three days' notice of lay-off required by the contract was never given.

In obedience to Smith's order, Braen collected materials to work on the raft and placed them at a door of the Winisook (R. 24). He then went about releasing a line from the bitt on the Winisook so as to pull the raft up opposite the door, he was going to secure it there (R. 24). As he was doing so, necessarily standing on the Winisook's catwalk, a part of it suddenly gave way and he was

thrown to the raft sustaining serious personal injuries (R. 24-26, 62).

Defendant had paid Braen cure and maintenance for the injuries so sustained (R. 61-62).

ARGUMENT

POINT I

Braen sustained his injury in the course of his employment as a seaman and a member of the Pfeifer's crew. At the very least, the issue was one of fact for the jury.

The Court of Appeals has stated that Braen's testimony as to the nature of the services he had been ordered to perform and was about to perform when the accident happened, established, as a matter of law, that Braen was not injured in the course of his employment as a seaman *or* as a member of the crew of the Pfeifer No. 2 (R. 73-74). It is not clear what the Court intended to convey by its use of the disjunctive "or". The implication is that Braen was not injured in the course of his employment as a seaman, or if injured as a seaman, he was not injured in the course of his employment as a member of the crew. Neither premise is tenable.

That Braen was not injured in the course of his employment as a seaman

The existence of a question of fact as to the status of an injured maritime worker, whether a seaman or not, usually arises when one, not in general employ as a seaman, seeks to assume the mantle of one in order to gain

the benefits of the Jones Act. In such a case, the man's activities serve to define whether he is a seaman or not.

If the work he is doing at the time of injury is traditionally performed by a seaman, or is calculated to further the mission of the vessel, the jury may find that he is a seaman at the time of the injury. *Grimes* v. *Raymond Concrete Pile Co.*, 356 U. S. 252, 2 L. Ed. 2nd 737; *Butler* v. *Whiteman*, 356 U. S. 271, 2 L. Ed. 2d. 754; *Gianfala* v. *Texas Co.*, 350 U. S. 879, 100 L. Ed. 775; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 84 L. Ed. 732; *Wilkes* v. *Mississippi River Sand & Gravel Co.* (C. A. 6), 202 F. 2d 383; *Gahagan Construction Corp.* v. *Armao* (C. A. 1), 165 F. 2d 301; *Summerlin* v. *Massman Construction Co.* (C. A. 4), 199 F. 2d 715; *Offshore Co.* v. *Robison* (C. A. 5), 266 F. 2d 769. In the cited cases the injureds, although employed in such diversified capacities as members of a drilling crew on a submersible barge, a fireman on a derrick, a common laborer or deckhand on a dredge, were held to be seamen because they did work that seamen do to accomplish the vessel's mission.

If the work that the injured is doing is customarily performed by shore personnel then the injured is not a seaman. *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, 96 L. Ed. 205.

There is no such issue here. This is not a case of one, not overwise a seaman, claiming to have become one for a particular time in order to come within the purview of the Jones Act. There is no question that at 8:00 o'clock in the morning of January 22, 1953, Braen was not only a seaman, but had been so employed aboard the Pfeifer No. 2 for some four months before.

What is it that happened between 8:00 o'clock and 9:00 o'clock to alter Braen's status as a seaman so as to vitiate the duties owed to him and divest him of the rights he had as such?

It could not be the alleged lay-off. Not only was the lay-off denied, it was precluded by the contract provisions which created and preserved Braen's status. *The Buena Ventura* (D. C. S. D. N. Y.), 243 F. 797, 800; *Weiss* v. *Central Railroad Co. of New Jersey* (C. A. 2), 235 F. 2d 309, 313; *DeLuca* v. *Red Salmon Canning Co.*, 2 Cal. App. 2d 124, 37 P. 2d 704. In any event, defendant has conceded both in its briefs below and in its opposition to Braen's petition, that the alleged lay-off was not a factor in its contentions.

Was it that the accident happened aboard the Winisook rather than on the Pfeifer itself? This is of no moment. The duties owed by the defendant in respect to the maintenance of the Winisook were the same as the duties owed by it with respect to the Pfeifer No. 2. As pointed out in the statement of the case, it was conceded that the catwalk of the Winisook was a necessary means of passage from and to the Pfeifer. Accordingly, the Winisook is to be deemed as a part of the Pfeifer equipment with respect to which the defendant owed to its seamen the obligation of reasonable care. *Alaska Steamship Co.* v. *Petterson*, 346 U. S. 914, 98 L. Ed. 410; *Standard Oil Co.* v. *Robins Dry Dock* (C. A. 2), 32 F. 2d 182; *Marceau* v. *Great Lakes Transit Corp.* (C. A. 2), 146 F. 2nd 416, cert. denied 324 U. S. 872.

That the Pfeifer No. 2 was not in transit at the time of the accident is, of course, an irrelevance. The Pfeifer, ready to leave the same or next day, was a vessel in navigation, even though at the time of the accident repairs were being made. *Hunt* v. *United States*, 17 F. Sup. 578, aff'd (C. A. 2), 91 F. 2d 1014, cert. denied 302 U. S. 752; *Carumbo* v. *Cape Cod Steamship Co.* (C. A. 1), 123 F. 2d 991, 995.

Was it that the injuries occurred when Braen was about to do decking of a raft—work that involved carpentry? If that was the basis of the decision (R. 72) it was

clear error. Seamen have been handling carpentry tools as part of their duties since the Phoenicians plied their triremes along the shores of the Mediterranean. A ship's carpenter is a seaman even when he is doing his work while the vessel is in drydock. *Rogosich* v. *Union Drydock & Repair Co.* (C. A. 3), 67 F. 2d 377, 378; *Kuhlman* v. *W. & A. Fletcher Co.* (C. A. 3), 20 F. 2d 465, 468.

The above constitutes all the factual changes between 8:00 o'clock in the morning, when Braen was a conceded seaman, and the time when the accident happened, an hour or so later. They cannot possibly found a holding that when Braen was hurt, his injury was not in the course of his work as a seaman in defendant's employ.

That Braen was not hurt in the course of his employment as a member of the crew

It is not to be denied that at 8:00 o'clock in the morning on the day of the accident, Braen was not only a seaman but was also a member of the Pfeifer's crew, and that he had been such a member for four months before.

If the Court of Appeals meant that Braen was no longer a member of the crew when injured, then what we have said about Braen's alteration of status as a seaman after 8:00 o'clock applies with equal force to any argument that his status as a member of the crew had been changed when he was injured.

We will demonstrate in a subsequent portion of the brief that since Braen was a member of the crew when ordered to do the work during the performance of which he was injured, and since his status had never changed, the "nature of the service" he was ordered and about to perform is irrelevant to the applicability of the Jones Act. Assuming, at this time, that the nature of the services Braen was ordered to do is relevant to the issues, then,

there was ample evidentiary basis for the jury's finding that Braen was injured in the course of his employment as a member of the crew.

The rule was stated in *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370, 373, 1 L. Ed. 2d 404, as follows:

> "* * * [T]he duties of a man during the vessel's travel are relevant in determining whether he is a member of the crew while the vessel is anchored."

As a seaman aboard the Pfeifer, Braen's duties included maintenance, painting, chipping, scraping and minor repairs. Minor repairs were precisely what he had been ordered to do and was about to do when injured.

The Court of Appeals has noted that the raft Braen was about to work on pursuant to the orders of his employer, was not intended to be used and was not used in repairing the cargo pump of the Pfeifer No. 2 (R. 71-72). If that was the basis of decision, it was error. Smith testified that the raft was not intended to be used in connection with Pfeifer No. 2 "*at that time*" (R. 48). The wording certainly betokens that somewheres along the line the raft was going to be used in connection with the Pfeifer No. 2. The record shows that when so used, Braen would help out.

For the Jones Act to be applicable it is not necessary that the work during which injury occurs be then and there connected with the navigation of the vessel. *Hunt* v. *U. S.*, 17 F. Sup. 578, aff'd (C. A. 2), 91 F. 2d 1014, cert. denied 302 U. S. 752; *Butler* v. *Whiteman*, 356 U. S. 271.

In the *Hunt* case, plaintiff was injured while painting rust spots in the hold while the vessel was in drydock undergoing repairs that would take two or three weeks to accomplish. The Court held that plaintiff was a member of the crew entitled to his remedy under the Jones Act even though he had not signed ship's articles.

In the *Butler* case, a tug was undergoing rehabilitation preparatory to a coast guard inspection, presumably in anticipation of a return to service. During the period of the tug's inactivity decedent was employed as a laborer doing odd jobs on defendant's wharf. At the time of the accident, plaintiff was on his way to the tug in order to clean its boilers. It was held that whether plaintiff was a seaman and member of the crew entitled to a Jones Act remedy was for the jury.

The proof is much stronger for Braen than it was for the plaintiff in the *Senko* case. In that case, the deceased, a handyman, was killed by the explosion of a coal stove while placing signal lanterns from the dredge in a shed on a neighboring bank. The Court pointed out that if the dredge were in transit, the jury "could believe" that his duty would require him to clean navigation lights; that if the dredge leaked, the jury "could suppose" that his job would be to repair the leak. It held that this was enough to create a question of fact as to Senko's status as a member of the crew at the time of his injury. Here, if the Pfeifer required painting or minor repairs, the jury did not have to suppose that Braen would do the work—that was his conceded duty. The jury would not have to suppose that the raft would be used for that kind of work—that was testified to without contradiction. Certainly in making the raft fit for such use, Braen was engaging in activity that was in the service of his vessel, he was acting as a member of the crew—at least a jury with full propriety could so find.

The position that a party takes prior to a trial with respect to an issue is probative of that issue when denied at the trial. *Pekelis* v. *Transcontinental & Western Inc.* (C. A. 2), 187 F. 2d 122; cert. denied 341 U. S. 951.

Defendant had paid Braen maintenance and cure for the injuries sustained in the accident. The remedy of an

employee encompassed by the Longshoremen's & Harbor Workers' Act and the remedy of a member of a crew for maintenance and cure are mutually exclusive, *Norton* v. *Warner Co.*, 321 U. S. 565, 570; *Weiss* v. *Central Railroad Co. of New Jersey* (C. A. 2), 235 F. 2d 309, 311. Accordingly, the payment to Braen of maintenance and cure can be regarded in the nature of an admission on defendant's part that Braen had sustained his injuries in the course of his employment as a member of the crew.

The above evidence, therefore, comprises a sufficient nexus of probative facts from which a jury could find that Braen's injury occurred in the course of his employment as a seaman and a member of the crew so as to preclude the Court of Appeals from nullifying the jury finding to that effect and itself directing final judgment to the contrary. On the very face of it, there was not that absence of probative facts which empowers a Court of Appeals itself to decide an issue which is fundamentally for the jury.

The nature of Braen's services when injured is irrelevant to his right to a remedy under the Jones Act.

It is further demonstrable that on the facts of this case, defendant, in succeeding to have the issue of Braen's status at the time of the accident passed on by the jury, obtained more than it was entitled to.

Members of a crew do not cease to be such nor do they lose their rights as such because put to work that is ordinarily done by non-members of a crew, such as mechanics, or repairmen, or cleaners, or stevedores. *Maryland Casualty Company* v. *Lawson* (C. A. 5), 94 F. 2d 190; *Carumbo* v. *Cape Cod Steamship Co.* (C. A. 1), 123 F. 2d 991; *De Luca* v. *Red Salmon Canning Co.*, 2 Cal. App. 2d 124, 37 P. 2d 704. In the latter case, where it was claimed by the

defendant that the injured, doing stevedoring work, was relegated to his remedy under the Longshoremen's and Harbor Workers' Act, the Court wrote:

> "Plaintiff signed the shipping articles as a member of the crew and was ordered into the hold of the vessel to unload the cargo. He was still a member of the crew and was performing these labors under orders of his superiors in the vessel; and while so engaged received the injury complained of in the regular course of his employment. The action therefore falls under the provision of the Jones Act."

There is nothing in the Jones Act or in the Longshoremen's and Harbor Workers' Act which declares that the right of one who *is* a seaman and a member of a crew to a remedy under the Jones Act is dependent on the nature of the services performed when injured. The plain intent of the Jones Act is that so long as what the seaman is doing at the time of his injury is in the course of his employment, he is entitled to his remedy under it. *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370, 373.

The irrelevance of the "nature of the duties" to the question of the applicability of the Jones Act when the injured is a seaman and a member of the crew hurt in the course of his employment is illustrated by the following:

In *Marceau* v. *Great Lakes Transit Corp.* (C. A. 2), 146 F. 2d 416, cert. denied in 324 U. S. 872, defendant's vessel was moored at a dock. Plaintiff left the vessel on shore leave for personal business and recreation. On his return he walked up the dock towards the boat and approached a ladder belonging to the ship which led to the dock. The ladder was a recognized mode of egress from and ingress to the ship for the crew. When he was within five feet of the ladder he slipped and fell, sustaining injuries. There had been a pile of flour or meal deposited near the foot of

the ladder which had become slippery. The Court wrote (p. 418):

> "The plaintiff was acting under orders when he returned to the ship. Consequently, at the time of the accident he was not only acting in the course of his employment but suffered his injuries while on property in the possession and under the control of the defendant as lessee and over which the plaintiff had to pass in order to return to his work. Under the decisions a man is acting in the course of his employment when coming to or returning from work, and upon the employer's premises or upon adjacent property, if approaching by a customary route."

In *Wong Bar* v. *Suburban Petroleum Transport* (C. A. 2), 119 F. 2d 745, plaintiff was injured while he was leaving the vessel after having been told that no work was required of him and that he was free to go home. The Court held the plaintiff was entitled to his remedy under the Jones Act because

> "the employee continues in the course of his employment until he has left his place of employment; hence, in leaving the tugboat Seabrook and Wong Bar were acting in the course of their employment".

If Braen had been leaving the Winisook in order to go ashore on some personal errand, or because he had been told to take the day off, and while doing so had been hurt because the catwalk of the Winisook collapsed under him, he would, under the cited authorities, have a remedy under the Jones Act. It is impossible to believe that when the same injury occurs while doing work, or preparing to do work, that he had been directed by his superiors to do, he is not entitled to his remedy under the Jones Act. If at the moment that Braen was about to descend to the raft, he had been recalled to fix the pump and the accident occurred then, even defendant would concede its liability.

To make the broad remedial provisions of the Jones Act depend on a segmentation of conduct that is here indulged in is unthinkable.

Nor is anything in the Longshoremen's and Harbor Workers' Act which provides or permits any narrowing of the Jones Act remedy as here contended.

The exclusionary provisions of the Longshoremen's and Harbor Workers' Act are plain and clear. Section 903(a)(1) provides that no compensation shall be payable in respect to disability or death of a master or member of a crew of any vessel. That is all. There is not a word in the statute so much as suggesting that only certain members of a crew are within the exclusionary clause, *viz.*, those injured in the service of the vessel, or those doing a certain type of work. The exclusionary clause is all embracing —members of a crew—without limitation, without circumscription, without modification.

Patently, therefore, if an injured man is a member of a crew, no matter what may be his activities at the time of injury, so long as they are in the course of his employment, the Longshoremen's and Harbor Workers' Act in terms does not apply. The purpose of the Act makes that clear.

Prior to the passage of the Longshoremen's and Harbor Workers' Act in 1927 the remedies available to longshoremen for injuries sustained in the course of their work was limited. By reason of their employment, they could not turn to state compensation laws; the Jones Act was not available to them since the owners of the vessels were not their employers. Other than a claim against the vessel for injuries caused by unseaworthiness, longshoremen had no remedies. The Act was passed to fill this gap in their remedies. It was never intended to affect or limit in the slightest the traditional rights and remedies of seamen, members of a crew. *Parker* v. *Motor Boat Sales*, 314 U. S.

244, 249, 86 L. Ed. 184; *Weiss* v. *Central Railroad Co. of New Jersey* (C. A. 2), 235 F. 2d 309, 311; *South Chicago Coal and Dock Co.* v. *Bassett*, 309 U. S. 351; *Swanson* v. *Marra Bros.*, 328 U. S. 1, 90 L. Ed. 1045.

In holding that the plain language of the Longshoremen's & Harbor Workers' Act that crew members are not within its coverage does not mean what it says, but means that only such members of a crew are excluded from coverage as were injured in the service of their vessel, or as were doing a certain type of work, the Court of Appeals was engaging in an unwarranted amendment of the act rather than an interpretation of it.

When a seaman and member of a crew engages in an activity that his superior has ordered him to do, and is injured in that work, he is injured in the course of his employment as a seaman and a member of the crew. Then and there he is entitled to his Jones Act remedy.

> "Coverage of the Jones Act depends *only* on the finding that the injured was an employee of the vessel engaged in the course of his employment at the time of his injury." (Emphasis supplied.)
>
> *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370, 373.

That is this case.

POINT II

Pursuant to U. S. C. A. Section 2111, petitioner is entitled to a restatement of his District Court judgment.

If we are correct in our contentions, what remedy is Braen entitled to from this Court? The Court of Appeals has stated that if it was in error in holding that no question of fact was presented, it would reverse in any event and order a new trial because of the District Court's failure to charge certain of defendant's requests (R. 74-75).

Assuming, *arguendo*, that the requests to charge properly stated applicable propositions of law (it will be demonstrated that they did not), we submit that no substantial rights were affected by the refusals to charge and that accordingly, the errors, if any, should be disregarded.

The general rule is that while misdirection is error, non-direction is not. Thompson on Trials, Section 2346. The English courts hold that

> "non-direction is only a ground for granting a new trial where it produces a verdict against the evidence."
>
> *Great Western Railway* v. *Fawcett*, 8 Law T. 31.

The requests to charge dealt with Braen's activities at the time of the injury on the theory that they affected his status. We have shown that on the facts of this case, defendant's having the issue submitted to the jury was more than it was entitled to. We have shown, assuming the issue was for the jury, that the evidence was such as to make a finding that Braen was not injured in the course of his employment as a seaman and a member of the crew against all the evidence. Accordingly, the refusals to charge did not and could not affect any substantial rights of the de-

fendant. 28 U. S. C. A., Section 2111 therefore applies and petitioner is entitled to a reinstatement of his judgment.

In any event, there was no error in the refusals to charge.

Request No. 1—"The mere fact that the plaintiff had been a seaman and member of the crew of the barge Pfeiffer No. 2 prior to his injury, does not entitle him to maintain this action against his employer." (R. 10-11)

This request, as phrased, stated no proposition of law that would help the jury to determine whether Braen was injured in the course of his employment as a seaman, a member of the crew. The words "does not entitle him to maintain this action" did not convey to the jury what defendant presumably had in mind—a definition of seaman and member of a crew. From a jury standpoint the request was without meaning.

Counsel might as well have requested a charge that merely because plaintiff had coast guard papers or had a certificate as a tank man or was a member of a seamen's union, did not mean that he was entitled to maintain this suit. The request clarified no issue. The claim of error in refusing to charge the request is, therefore, without substance, particularly since Braen's duties had been made a test of his being a member of the crew (R. 5, 10).

There was no suggestion by the charge or otherwise that Braen was a seaman and member of the crew at the time of the accident merely because he had been a seaman and member of the crew; there was no need for a request of this kind.

Request No. 2—"It is the nature and character of the work being performed by the plaintiff at the time his injury was sustained which determines whether he has the right to maintain this law suit." (R. 11)

What we have said about the verbiage used in request No. 1 applies with equal force to this request. In addition, it was so general and abstract in its language as to be meaningless—it explained nothing. Moreover, the thought behind it was substantially charged (R. 5). Accordingly there is no error for not using defendant's phraseology. *Ayers* v. *Watson*, 137 U. S. 584, 601, 34 L. Ed. 803; *Continental Improvement Co.* v. *Stead*, 95 U. S. 161, 24 L. Ed. 403.

Request Nos. 3 and 4 (R. 11)—These requests made furtherance of navigation of the Pfeiffer No. 2 as the conclusive tests of the applicability of the Jones Act.

"Navigation", in law, is a word of art. It encompasses many different activities quite divorced from the lay understanding of the word—the act or science of laying out a ship's course and keeping on it. In law, such diverse services as those of a cook, a bartender, a telephone operator, a musician, to name but a few, are considered part of navigation. Norris, *The Law of Seamen*, Section 651. A jury could not be expected to know that. As phrased, therefore, the requests not only did not clarify any issue but would serve to confuse and mislead.

> "The test for the correctness of an instruction does not lie in the indulgence which a lawyer in his office with the aid of his books, or the trial and appellate

courts with the benefit of briefs and arguments of counsel, give to instructions, but as to how the instructions will naturally be understood by the average men composing juries."

Government Employees Insurance Company v. *Davis* (C. A. 5), 266 F. 2d 760, 765, citing 88 C. J. S. Trial, Sec. 338, pp. 894, 895.

Moreover, as phrased, the requests could lead the jury to believe that unless Braen's work then and there furthered navigation of the vessel, he was out of court. That, as has been demonstrated, is not the law.

The requests, not embodying a clear and full statement of applicable law, were properly refused.

CONCLUSION

The judgment of dismissal should be reversed and the District Court judgment reinstated.

Respectfully submitted,

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